United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1214

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

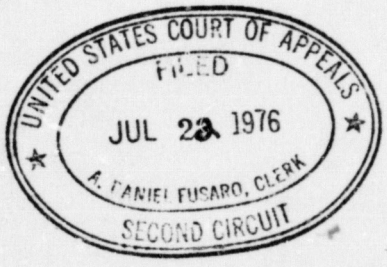
RONALD ROBINSON,

Defendant-Appellant.

Docket No. 76-1214

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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ON APPEAL FROM A JUDGMENT
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QUESTIONS PRESENTED

1. Whether appellant Robinson's conviction for possession of checks stolen from the mails (Counts 3, 5, 7, 11, 13, 15, 17) must be reversed and dismissed for failure to prove that the checks involved were deposited in or stolen from the mails.

2. Whether the Court's charge, which removed essential elements of the crimes from the jury and failed properly to instruct the jury on the critical elements of intent and knowledge, was plain error mandating reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Bartels, J.) entered March 19, 1976, convicting appellant Ronald Robinson after a jury trial of seven counts of uttering forged endorsements with the intent of defrauding the United States (18 U.S.C. §§495, 2), seven counts of possessing checks stolen from the mails (18 U.S.C. §§1708, 2), and one count of conspiracy to steal from the mail, forge, and utter United States Treasury checks (18 U.S.C. §§371, 495, 1708). Appellant Robinson was sentenced to the custody of the Attorney General for a period of ten years on each uttering count, the sentences to run concurrently with each other, and to five years' imprisonment on the conspiracy and possession counts, the sentences to run concurrently with each other but consecutively to the sentences imposed on the uttering counts, for a total of fifteen years' imprisonment.

By order dated May 11, 1976, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for Mr. Robinson on appeal.

Statement of Facts

Indictment No. 75 Cr. 783 charged appellant Ronald Robinson and his co-defendant James Black with seventeen counts. In Count One, appellant, Black, and "others known and unknown to the Grand Jury" were charged with a conspiracy to steal from the mails, forge the endorsements, and utter as true numerous U.S. Treasury checks. The indictment also charged sixteen substantive counts. Counts 2, 4, 6, 8, 10, 12, 14, and 16 charged appellant Robinson with uttering and publishing as true the forged endorsements of eight Treasury checks. Counts 3, 5, 7, 9, 11, 13, 15, and 17 charged him with illegal possession of the same eight checks.[1] The Government's theory of the case was that appellant and co-defendant Black opened a grocery store, the New York Boulevard Deli, as a means of negotiating large numbers of stolen Treasury and welfare checks. The pair opened two bank accounts for the store and, after purchasing stolen checks at a discount, deposited those checks in the account and then withdrew the cash representing the proceeds of the checks. The substantive counts concerned eight Treasury checks, all but one of which were deposited in the New York Boulevard Deli accounts, allegedly as part of the scheme.

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[1] See Indictment No. 75 Cr. 783, reproduced as B in appellant's separate appendix.

On November 12, 1975, co-defendant Black pleaded guilty to the single count of conspiracy.

A. The Trial

The trial of appellant commenced on January 5, 1976. The Government's proof consisted of evidence relating to the scheme alleged, voluminous evidence of prior similar acts, and evidence specifically relating to the eight checks which were the predicate for the sixteen substantive counts.

B. Evidence Relating Specifically to the Substantive Counts

Eight U.S. Treasury checks, each payable to a different payee, dated from May 1, 1974, to July 26, 1974, were introduced into evidence by the Government (Tr.74-81, 102-103, 199-201; GX 7-13, 17[2]).

Theresa Venditti, the named payee in one of the Treasury checks (Counts 12-13 of the indictment) testified that she had received Social Security checks for ten years, always by mail, and that she did not receive the check named in Counts 12-13;

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[2]Numerals in parentheses preceded by "Tr." refer to pages in the trial transcript, while numerals preceded by "GX" refer to Government Exhibits admitted into evidence.

she also testified that the endorsement of her name appearing on the back of the check was not made by her, and that the check was deposited in a bank in which she had no account (Tr. 190-191).

Following Ms. Venditti's testimony, defense counsel and the Assistant U.S. Attorney agreed, out of the jury's presence, to the following stipulation covering the other seven Treasury checks:

> MR. MARKS: Your Honor, counsel stipulates that if the other payees were called they would testify that they always received the Social Security checks in the mail, but they never received these and the endorsements appearing on the reverse side of the checks were not theirs, and [they] did not have bank accounts in those banks.
>
> (Tr.193).

Mr. Marks, the Assistant U.S. Attorney, then proceeded to read the stipulation to the jury:

> That if Thony Terianona, who is named in Counts 2 and 3 were to testify, she would testify that she never received the check which is described in Counts 2 and 3. And that she ordinarily received those Social Security checks through the mail. And the name Thony Terianona appearing as an endorsement on that check was not in her handwriting.
>
> (Tr.195).

This statement was in essence repeated with respect to each payee (Tr.195-197). There was no testimony by stipulation or otherwise that the specific checks were placed in the mails or stolen from the mails.

Mr. Luciano Capeto, a handwriting expert, was unable to

state whether either appellant Robinson or Black had written the endorsements of the payees' names on the eight checks specified in the indictment (Tr.364). Mr. Caputo did testify that some of the endorsements were "unnatural writings" and that several of them appeared to have been written by the same individual (see Tr.339-345).

The eight checks were negotiated and deposited in three separate accounts. One of the checks, addressed to Mario and Ramona Colon, was secondarily endorsed by appellant Robinson and was deposited directly by him into an account in the name of appellant's liquor store, an enterprise in which Black took no role (Tr.200-201, 323, 348; GX8); one of the checks was deposited in an account opened by Robinson and Black at the National Bank of North America in the name of the New York Boulevard Deli, and it was secondarily endorsed in the name of the store by Black (Tr.288, 339-340, GX9). The other six checks were deposited in an account at the Marine Midland Bank which was opened by Robinson and Black in the name of the New York Boulevard Deli (Tr.247, 275-276; GX7, 10, 11, 12, 13, 17). Five of these six checks were secondarily endorsed in the name of the New York Boulevard Deli by means of a stamp provided by the bank (Tr.80; GX7, 11, 12, 13, 17). The other check contained an endorsement handwritten by Black (Tr.188; GX10).

C. Testimony on the Scheme and Prior Similar Acts

The principal prosecution witness was the co-conspirator James Black, by self-admission a former "pimp," gambler, heroin addict, and "habitual liar" with a formidable prior record, including a 1975 conviction for bank robbery for which he had received a twenty-year sentence, several convictions for assault, pimping, illegal sale and transportation of whiskey, possession of heroin with intent to sell, robbery, and his plea in the instant case to conspiracy (Tr.12-13, 15-24, 524). While Black initially denied receiving any promises as to the length of his sentence, he later stated that he was promised that the Assistant U.S. Attorney would call his cooperation to the court's attention at sentencing on the single conspiracy charge to which the accomplice was permitted to plead, in addition to writing a letter to the parole board (Tr.13-14).

According to Black, he first met appellant Robinson at Robinson's liquor store at the end of 1973; after the pair met several more times, they reached an agreement to open a partnership in a food store. When Black questioned how he would make enough money at the venture, Robinson explained that he would make money by buying checks for one-third of their value and cashing them (Tr.24-28). Robinson provided the money to open the store; shortly thereafter, the pair opened an account in the Marine Midland Bank in the name of the store, the New York Boulevard Deli; they later opened a second account at the

National Bank of North America (Tr.30-31, 32-37, 49-52, 62-65; GX1-5).

Black testified that on a number of occasions during the spring and summer of 1974 various individuals came to the store to cash welfare and Treasury checks. The general procedure, as described by Black, was that an individual would come with several thousand dollars worth of checks, most of which did not contain payees' endorsements. Black would call appellant Robinson, who would either tell Black to pay for the checks with funds from the store or send him to Robinson's liquor store to pick up the money. Black would pay one-third of the face value for the checks. At the end of the day he would take the checks to Robinson where they would be transferred to a safe in Robinson's liquor store; the next morning the checks, with the payees' endorsements signed, would be ready for deposit. The secondary endorsement would be signed by Black, in Robinson's presence, or stamped with the stamp, allegedly kept in Robinson's safe, given to Black by the Marine Midland Bank. Thus, there is no evidence that appellant Robinson signed any of the endorsements for the checks deposited in the deli accounts. Several days after the deposit, Black would withdraw the money from the accounts with slips signed by Black and Robinson (Tr.53-62, 71-73, 87-90, 113-114, 164, 167, 1[illegible], 183-186). After paying their bills, the pair would divide the proceeds, with Black getting one-third and appellant Robinson two-

thirds of the cash (Tr.95-97, 112).[3] Black stated that among the people who brought in checks were one Harvey Mooring, who worked at the Department of Welfare, and Dennis Morgan, a postal employee (Tr.71-73, 91-92, 103).

Officials of the banks where appellant Robinson and Black maintained their New York Boulevard Deli accounts testified for the Government. Robert Downes, operations officer for Marine Midland Bank, testified that in the approximately six-month period the account was open in his bank, $48,000 was deposited into the account, including eleven Treasury checks and numerous welfare checks amounting to $45,000 (Tr.198, 201, 232-233, 266), a number of which were later discovered to be forged (Tr.270-271). Mr. Thomas McGlynn, loss control co-ordinator for the National Bank of North America, testified that $26,000, most of which consisted of welfare and Treasury checks, was deposited in the New York Boulevard Deli account and that $18,000 of the checks deposited in the account were subsequently returned as forgeries (Tr.284, 289-290). The

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[3]During the time of this conspiracy Black was addicted to heroin, a habit which cost him some $200 per day (Tr.23).

Government introduced scores of welfare checks,[4] U.S. Treasury checks, deposit slips, and withdrawal checks negotiated on both accounts (GX14-36). A number of withdrawal checks were signed by Black, a number were signed jointly by him and Robinson, and some were signed by Black with Robinson's name forged (Tr.99-100, 351, 364-373).

Finally, the Covernment admitted into evidence a taped conversation between Robinson and John Chapelle, an undercover investigator for the New York City Department of Investigation (Tr.376-381, 393, 399-415; GX49), in which Robinson admitted he was dealing in welfare checks obtained directly from the welfare office at Number Two Broadway.

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[4]The welfare checks were admitted into evidence along with the following stipulation:

> [A]s I understand it, [it] has been stipulated [that they] were undoubtedly stolen from the Department of City Welfare, and that they [sic] names of the payees undoubtedly were forged thereon.
>
> (Tr.227).

D. The Defense Case

Appellant Robinson, a 38-year old veteran of the Army with no prior arrests or convictions, denied conspiring to deposit stolen checks and disclaimed any knowledge that Black was depositing stolen Treasury checks in the New York Boulevard Deli accounts (Tr.439-442, 444, 455). Robinson testified that he had lent $6,000 to Black to open the deli, that he therefore maintained a security interest in the business, and that he had received some $4,000 from the accounts (Tr. 443-445). He testified that the books and stamps for the account were kept at the New York Boulevard Deli. He denied possessing the checks cashed by Black, and he was unaware that the checks so cashed were forged. Robinson reaffirmed that his handwriting does not appear on the stolen Treasury checks deposited in the New York Boulevard Deli accounts (Tr.452-453).[5]

Appellant Robinson stated that he had opened five bank accounts under the name of James Brown (Tr.458-463, 470-486). However, those accounts were unrelated to any business transacted through the New York Boulevard Deli. On cross-examination, the Government admitted into evidence two Treasury checks deposited in a personal account at European American Bank (Tr.

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[5] With the exception of the one check deposited to his wine and liquor store account, for which he required identification (Tr.452-454).

503-514). With respect to those two checks, the following stipulation was agreed to, a stipulation which differs significantly from the stipulation regarding the eight Treasury checks named in the indictment: "It has been stipulated that this check was stolen from the mails" (Tr.528).

E. The Court's Charge[6]

Following the prosecution and defense summations, the court commenced its charge by defining "reasonable doubt" and reading the indictment and two substantive statutes, 18 U.S.C. §§495 and 1708. Judge Bartels then continued with the following definition of §1708:

> Now, the elements of the offense as charged in these counts of the indictment are one, the unlawful possession of an article, such as a check, stolen from the United States mail, and, two, knowledge that the article, such as a check, was stolen from the United States mail.
>
> Now under the element of the offense it is unnecessary for the Government to prove that the defendant himself stole the checks but it is sufficient under this particular element of the offense that a defendant knew that the checks were stolen from the mails.
>
> In order to find the defendant guilty under this statute, it is sufficient that you find, beyond a reasonable doubt, that the defendant unlawfully had in his possession anything stolen from the United States mail, such as a check, knowing the same to have been stolen.

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[6]The complete charge is reproduced as C to appellant's separate appendix.

> You will notice in both cases I emphasized the fact that the defendant must know that either the check was forged under the first statute or he must know that the check was stolen under the same, under the second statute.
>
> The burden is upon the Government to prove, beyond a reasonable doubt, these two elements, and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal under these counts.
>
> (Tr.590-592; emphasis added).

The court proceeded to submit the case under the alternative theory of aiding and abetting, and to define the offense of conspiracy, but included no specific statements on the elements of the substantive statute necessary to sustain a finding of conviction of conspiracy. Later the court returned to this issue of the elements necessary to a conviction on the substantive counts, and stated:

> I think I might say if I am not mistaken as to the checks covered by the counts two through seventeen inclusive, I think it was stipulated that those checks were stolen, and the endorsements thereon were forged. It was definitely stipulated, so, the real question is their knowledge.
>
> (Tr.602).

The court continued:

> Now you have heard me refer to the fact that knowledge and intent was necessary for conviction. Now to be found guilty in this case you must find that the defendant Ronald Robinson had possession of stolen checks, stolen checks from the mail and that as to certain counts of the indictment he knew the checks were stolen and as to the other counts of the indictment he knew that the payees' names were forged.

Now, as to certain counts of the indictment, you must also find that there was an intent to defraud the United States of America. Now I'm not mentioning specifically those counts. All you have to do is look at the indictment and you will see what is charged in those counts.

They say here that it was stipulated that the checks covered by the indictment were stolen and that the names of the payees were forged. So that leaves the question of intent to defraud and the question of knowledge on the part of the defendant Robinson.

"Knowledge," as well as "intent," is descriptive of a state of mind, and as an element of the offense is seldom, if ever, susceptible of direct proof. The proof of this element of knowledge and intent may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears as the only reasonable and logical inference that the accused had knowledge of the illegal possession of the United States Treasury checks or that the accused had knowledge that the endorsements on the checks were forged.

But in determining knowledge or intent you must consider his intelligence or sophistication. No person can intentionally avoid knowledge by closing his eyes to the facts that would lead a reasonable man to investigate. However, a mere suspicion that something is wrong or improper is not equivalent to knowledge or intent.

On the other hand, knowledge and intent may be inferred from the acts of the party and it is a question of fact to be determined from all the circumstances, and the jury may scrutinize the defendant's entire conduct at the time the offenses alleged were committed.

No person can disclaim knowledge merely by closing his eyes intentionally to facts which would otherwise have been obvious to a reasonable man. The circumstantial evidence sufficient to support a charge of knowledge

and intent to possess stolen United States Treasury checks or to negotiate them, issue, utter United States Treasury checks with forged endorsements thereon must be sufficiently persuasive, however, as to exclude the inference of innocence under the circumstances.

(Tr. 605-607; emphasis added).

Now, intent to defraud the United States as used in connection with the passing or possession of a forged United States Treasury check, means an intent to defraud third persons, known or unknown, by passing or uttering the forged check with knowledge that the same was forged. While the defendant must have knowledge that the check was forged, it is not necessary that he intended to defraud a particular person as long as he has the intent that the check had been cashed or passed or used as true and a genuine check, although in actuality, it was forged.

Intent may be proved by circumstantial evidence. What the defendant did or failed to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue of intent in this case a jury may reasonably infer, as I said before, that a person ordinarily intends the natural and probable consequence of acts knowingly done or knowingly omitted.

So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

(Tr.608-609).

Following deliberations, the jury found appellant guilty of all but two counts in the indictment, the two counts representing the check deposited in Robinson's liquor store account.

ARGUMENT

Point I

APPELLANT ROBINSON'S CONVICTION FOR POSSESSION OF CHECKS STOLEN FROM THE MAILS (COUNTS 3, 5, 7, 11, 13, 15, 17) MUST BE REVERSED AND DISMISSED FOR FAILURE TO PROVE THAT THE CHECKS INVOLVED WERE DEPOSITED IN OR STOLEN FROM THE MAILS.

Appellant was convicted of seven counts of possession of checks stolen from the mails, in violation of 18 U.S.C. §1708. In order to sustain convictions under these counts, the Government was required to prove "that the check[s] actually had been stolen from the mails" and that appe lant Robinson possessed them, knowing they were stolen. United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958) (emphasis added). Considering the evidence in the light most favorable to the Government (Glasser v. United States, 315 U.S. 60, 80 (1942)), the proof was utterly insufficient to establish that the checks alleged to have been possessed by appellant had ever been stolen from, or even deposited in, the mails. Thus, the judgment of conviction on Counts 3, 5, 7, 11, 13, 15, and 17 must be reversed and the charges dismissed.

Despite the overabundance of evidence of similar but uncharged crimes, the only evidence the Government saw fit to introduce concerning the mailing and receipt of the Treasury checks charged in the indictment was the testimony of one payee

that she normally received Treasury checks through the mail and that she had not received the particular check at issue, and a stipulation to similar effect with respect to each other Treasury check:

> That if Thony Terianona, who is named in Counts 2 and 3 were to testify, she would testify that she never received the check which is described in Counts 2 and 3. And that she ordinarily received those Social Security checks through the mail. And that the name Thony Terianona appearing as an endorsement on that check was not in her handwriting.
>
> (Tr.195).[7]

Neither the testimony nor that stipulation stated that the checks were ever mailed, nor did they concede that the checks were stolen. The stipulations were not supplemented by any subsequent testimony from the Treasury Department indicating that the checks were in fact mailed; nor was there any direct evidence of theft from the mails. Accordingly, the Government's proof was utterly insufficient to support a conviction. Cf. Giraud v. United States, 348 F.2d 820 (9th Cir. 1965), cert. denied, 382 U.S. 1015 (1966).

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[7]We note that this stipulation differs from the stipulation offered with respect to Treasury checks later admitted into evidence as "prior similar acts" on cross-examination of appellant Robinson. There, it was agreed that each check was "stolen from the mails" (Tr.528).

In Giraud, the defendant was charged with four counts of uttering forged Treasury checks and four counts of obstruction of correspondence, in violation of 18 U.S.C. §1702, an offense, like §1708, requiring proof that the check "had been in the United States mails and had been taken therefrom." There, as here, the Government failed to do what it does in most cases -- produce "evidence of mailing by testimony of the sender" (348 F.2d at 822). Finding the evidence insufficient absent testimony of mailing by the sender, the Giraud court reversed.

Here, the only evidence even arguably relevant to the question of mailing was the testimony of the payees that they normally received their Treasury checks in the mail and that they had not received the particular check named in the indictment.[8] Such evidence is insufficient, standing alone, to prove mailing or theft from the mails.

Appellant is aware of no case which has found sufficient evidence of mailing or theft from the mails from the mere fact that payees normally received their checks in the mail but did not receive a particular check. Rather, such evidence has been

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[8]Although Black testified that one of the people who brought checks worked in the Post Office, he did not testify that that individual brought only Treasury checks. Even more important, he did not testify that the particular checks in the indictment were purchased from that individual. It would be pure conjecture, then, to use Black's statement as evidence that the Treasury checks were stolen from the mails. This issue was not conceded by the defense. See infra at p.26, n.10.

held relevant to support a finding that an item was stolen from the mails only when coupled with some evidence from the sender that the checks were mailed (see, e.g., United States v. Bloom, 482 F.2d 1162 (8th Cir. 1973) (accounts manager of American Express testifies through business records that credit card is placed in envelope and mail bag with ZIP-sort number); United States v. Mooney, 417 F.2d 936 (8th Cir. 1969), cert. denied, 397 U.S. 1029 (1970) (official of employment security division testifies to manner in which unemployment office drafted and mailed checks and introduced business records to show actual check mailed); Webb v. United States, 347 F.2d 363 (10th Cir. 1965) (testimony from Oklahoma Department of Welfare establishing routine of delivery, no deviation from routine, and prompt delivery of other checks in area); Whiteside v. United States, 346 F.2d 500 (8th Cir. 1965), cert. denied, 384 U.S. 1023 (1966) (Treasury Department records admitted to show that check was issued, placed in a window-type envelope, and mailed); see also United States v. Hines, supra (jury may infer theft from the mails from non-receipt of letter properly mailed and absence of contrary explanation)); from evidence of the items themselves demonstrating that they were mailed (United States v. Baty, 486 F.2d 240, 242-244 (5th Cir. 1973), cert. denied, 416 U.S. 942 (1974) (testimony that check was found in postmarked letter)); or from direct evidence that a check was stolen (Smith v. United States, 343 F.2d 539, 544 (5th Cir.), cert. denied, 382 U.S. 861 (1965) (direct evidence of removal of

letter from mailbox)).

The facts of this case demonstrate in a graphic way that mere expectation of receipt is insufficient evidence that a particular check was mailed. According to the Governent's own proof, all the welfare checks admitted in this case as "prior similar acts" were stolen by a welfare department employee before they were ever placed in the mails.

Since there was no proof of whether the checks were mailed, there could be no evidence to support a conviction under 18 U.S.C. §1708. Accordingly, the judgment of conviction on those counts must be reversed and the counts dismissed. Moreover, because all but one of the five-year sentences were for the §1708 counts, the case should be remanded for resentence. United States v. Hines, supra.

Point II

THE COURT'S CHARGE, WHICH REMOVED ESSENTIAL ELEMENTS OF THE CRIMES FROM THE JURY AND FAILED PROPERLY TO INSTRUCT THE JURY ON THE CRITICAL ELEMENTS OF INTENT AND KNOWLEDGE, WAS PLAIN ERROR MANDATING REVERSAL.

The fundamental purpose of a charge is to instruct the jury on its general duties, the relevant law, and the procedure by which the jury is to determine the facts and apply the law. United States v. Persico, 349 F.2d 6 (2d Cir. 1965). To fulfill this function, it is essential that the charge neither be misleading on the law (Bollenbach v. United States, 326 U.S. 607, 614 (1946)), nor direct a verdict on issues which the jury is obliged to decide (United States v. Singleton, 532 F.2d 199 (2d Cir. 1976)). The court's charge in this case failed to satisfy either of these requirements. Judge Bartels' instructions on 18 U.S.C. §1708 erroneously removed from the jury's consideration the essential elements of whether the eight Treasury checks charged in the indictment were stolen from the mails or even whether appellant Robinson possessed the checks. His charge on intent was patently incorrect, and his instructions on knowledge were, at best, confusing. Taken as a whole, the court's errors prevented the jury from properly determining appellant Robinson's guilt of any of the charges against him. Accordingly, the judgment of conviction should be reversed.

A. The Charge on the Elements of §1708

In order to convict appellant Robinson of a violation of 18 U.S.C. §1708, the Government was obliged to prove, and the court to submit to the jury, the following elements: that appellant Robinson possessed a particular check; that the particular check was stolen, and stolen from the mails; and that appellant knew that the checks were stolen. The court's charge was utterly inadequate to impart these elements to the jury, and in fact had the effect of removing two of these issues from the jurors' consideration.

After reading the indictment and the pertinent portions of 18 U.S.C. §1708, the District Court outlined the elements of the offense:

> Now the elements of the offense as charged in these counts of the indictment are one, the unlawful possession of an article, such as a check, stolen from the United States mail, and, two, knowledge that the article, such as a check, was stolen from the United States mail.
>
> Now under the element of the offense it is unnecessary for the Government to prove that the defendant himself stole the check but it is sufficient under this particular element of the offense that a defendant knew that the checks were stolen from the mails. In order to find the defendant guilty under this statute, it is sufficient that you find, beyond a reasonable doubt that the defendant unlawfully had in his possession anything stolen from the United States mail, such as a check, knowing the same to have been stolen.
>
> You will notice in both cases I emphasized that the defendant must know that either the check was forged under the first statute or he

> must know that the check was stolen under the same, under the second statute.
>
> The burden is upon the Government to prove, beyond a reasonable doubt, these two elements, and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal under the second statute.
>
> (Tr.590-592; emphasis added).

This instruction, by confusingly lumping together the elements of possession and theft, created the grave possibility that the jury would overlook one or other of the elements in its deliberations. That probability was rendered a certainty when the court, in totally explicit language, misstated the stipulation on the checks, directly taking the issue of whether the checks were stolen from the mails from the jury and implicitly directing a verdict on the possession count:

> I think I might say if I am not mistaken that as to the checks covered by the counts two through seventeen inclusive, I think it was stipulated that those checks were stolen, and the endorsements thereon were forged. It was definitely stipulated, so, the real question is their knowledge.
>
> (Tr.602).

> They say here that it was stipulated that the checks covered by the indictment were stolen and that the names of the payees were forged. So that leaves the question of knowledge on the part of the defendant Robinson.
>
> (Tr.606).

The total effect of failing to charge as a separate element that the jury must find that the checks were stolen from the mails, coupled with the two explicit statements that every-

one agreed that the checks were stolen, could only have indicated to the jurors, in no uncertain terms, that they need not -- indeed, should not -- decide whether the checks were stolen or whether they were stolen from the mails. Worse still, the court's direction, on two occasions, that the only question remaining for the jurors' consideration was appellant Robinson's knowledge also suggested to the jurors that even the question of possession had somehow been conceded in the stipulations. Since the total effect of this portion of the charge was to direct a verdict on these issues, the charge was plain error requiring reversal. United States v. Singleton, supra; see United States v. Hines, supra, 256 F.2d at 564; United States v. Natale, 526 F.2d 1160, 1167 (2d Cir. 1975), cert. denied, 48 L.Ed.2d 193 (1976).

United States v. Singleton, supra, another case involving a charge under §1708, is directly on point. There, the same trial judge, in an almost identical charge, lumped together the elements of possession of the checks and the fact that they had to be stolen in such a way that there was no specific charge that the jury find the checks were stolen. Later in the charge, after several references to stolen checks, the District Court inadvertently stated:

> ... [F]rom the circumstances of this case, it would seem that the property that [sic], these checks, were recently stolen.
>
> (532 F.2d at 206).

Finding that this comment, " in combination with the lack of a

separate and distinct charge that the jury must find that the checks were stolen, more than probably indicated to the jury that the stolen status of the checks was an established fact," this Court reversed, despite the lack of an objection to the charge. Ibid.

Here, the District Court's error was even more egregious than in Singleton. Rather than merely state, as was done in Singleton, that it "seemed" that the checks were stolen, Judge Bartels here announced that it was "definitely stipulated" that the checks were stolen, an explicit direction that the jury need not consider the issue. Moreover, there was no statement in Singleton like the one here -- that only knowledge was at issue -- which could have been interpreted by the jury as dispensing with the requirement of proof of possession.

The District Court's conclusion that the stipulation had conceded that the checks were stolen was incorrect, for the stipulation agreed to by the defense and the Government recited only that the checks had not been received by the payees (Tr. 193, 195).[9] Moreover, unlike Singleton, the stipulations with

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[9] The stipulation recited only

> [t]hat if [the payee] were to testify she would testify that she never received the check ... [a]nd that she received those checks through the mail. And the [payee's] name ... appearing as an endorsement on the check was not in her handwriting.
>
> (Tr. 195).

The court's error was undoubtedly due to its confusion of

respect to the checks named in the indictment never included a concession that the checks had been mailed. Thus, unlike Singleton, the jury should have been specifically instructed to determine not only if the checks were stolen, but if they were "stolen from the mails."

Moreover, the stipulation unquestionably made no concession as to possession. It therefore was plain error mandating reversal for the court to instruct that only knowledge was at issue.[10]

(Footnote continued from the preceding page)

the stipulation on the checks covered by the indictment with the stipulations on the welfare checks and the Treasury checks admitted as "prior similar acts," for at those occasions, the defense stipulated that the welfare checks were stolen and the Treasury checks were "stolen from the mails" (Tr. 227, 528). Although the court's error was thus explicable, it was no less error than the charge in Singleton.

[10]While we anticipate that the Government will argue that counsel conceded or waived the issue (see United States v. Pravato, 505 F.2d 703 (2d Cir. 1974)) of whether the checks were stolen from the mails, no such waiver occurred.

In summation, defense counsel argued that there was no proof, apart from James Black's word, that the checks were "stolen from the mail" (Tr.548). The Assistant U.S. Attorney immediately objected, and the following occurred:

MR. MARKS: Objection. There is a stipulation.

MR. COIRO: That they were stolen.

THE COURT: And forged.

MR. COIRO: And forged.

MR. MARKS: Stolen from the mails was the stipulation.

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> MR. COIRO: And forged.
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(Footnote continued from the preceding page)

MR. COIRO: No, I would then be stipulating the case. I just said stolen.

MR. MARKS: I think we should have a side bar at this time.

MR. COIRO: The jury's recollection will be controlling.

THE COURT: As I understood, it was stolen. I will tell you, the welfare checks were not stipulated that they were stolen from the mail because that was not with the others.

MR. COIRO: That's right.

THE COURT: It was stipulated that they were stolen from the mails.

MR. COIRO: I'll go along with that.

THE COURT: And forged.

MR. COIRO: And forged.

MR. MARKS: Yes, Your Honor.

(Tr.549; emphasis added).

Counsel's statement that he had stipulated that "they" were stolen from the mails may well have referred to the two Treasury checks admitted, with the welfare checks, as other similar acts under a stipulation which in fact conceded that those checks were stolen from the mails. Certainly, given the ambiguity of the court's statement and counsel's specific denial only moments earlier that he had stipulated the issue of theft from the mails, it is less than logical to conclude that this later ambiguous statement was a concession as to the checks specifically named in the indictment.

Moreover, even if counsel's statement is regarded as referring to the Treasury checks charged in the indictment, it

(Footnote concluded)

is impossible to regard his "concession" as an intelligent waiver of appellant's right to have the jury determine this issue. For the simple fact is that the statement in question did not occur until councel was forcefully and inaccurately "reminded" by the Court and the Assistant U.S. Attorney that he had allegedly made such a concession. The confusion on this issue, as we have noted, was undoubtedly due to the insistence by the Government of introducing, over objection, a multitude of welfare and Treasury checks, under differing stipulations, as "prior similar acts." Having managed thus to confuse the issue, the Government may not now reap the benefit of that confusion.

Thus, this case is entirely unlike United States v. Pravato, supra, where the defense, for tactical reasons, waived and then exploited the mistake in the court's charge. Here, no tactical decision, exploitation, or waiver occurred. Finally, no matter what this Court's decision on this issue, there is no conceivable argument that appellant Robinson waived a determination on the issue of possession, an issue which the District Court took from the jury.

B. The "Natural and Probable Consequences" Charge

Appellant was charged with uttering forged endorsements and possession of stolen checks, offenses requiring proof of specific "fraudulent intent." United States v. Sullivan, 406 F.2d 180, 186 (2d Cir. 1969); United States v. Ellison, 494 F.2d 43 (5th Cir. 1974). He was also charged with conspiracy to steal, forge, and utter stolen checks, a crime, like the substantive offenses, requiring "specific intent." Cf. United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975). Despite the fact that specific intent was unquestionably an essential element of the crimes charged against appellant, the court delivered a charge on the issue irreconcilable with the requirement of specific intent:

> In determining the issue of intent in this case, a jury may reasonably infer, as I said before, that a person ordinarily intends the natural and probable consequences of acts knowingly done and knowingly done or knowingly omitted.
>
> So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.
>
> (Tr.608-609).

Judge Bartels' charge was utterly erroneous in this case. This Court has explicitly held that a charge that a person intends the "natural and probable consequences" of his acts is

error where the Government must prove "specific" intent. United States v. Bertolotti, supra, 529 F.2d at 159; United States v. Barash, 365 F.2d 395, 402-403 (2d Cir. 1966).

In Barash, this Court found reversible error in an almost identical "natural and probable consequences" charge. Barash was convicted of bribery, an offense requiring proof of payment, and the intent to influence. The Court held that a "natural and probable consequences" charge diluted the requirement of specific intent, allowing the jury to find the crime made out by proof of payment alone. 365 F.2d at 402. Here, the natural and probable consequences charge created the same grave risk that the jury would find, for example, the specific fraudulent intent required to sustain a conviction for uttering forged endorsements merely by the uttering itself, for the "natural and probable consequence" of that uttering was that the Treasury Department suffered loss. Since, as in most uttering cases, appellant's lack of knowledge and fraudulent intent was the core of his defense, the court's charge diluting that defense was grave and prejudicial error.

Similarly, the "natural and probable consequences" charge was an erroneous definition of the intent necessary to sustain a conviction for conspiracy. United States v. Bertolotti, supra.

In Bertolotti, the trial court charged, in a conspiracy case, that in determining knowledge, wilfullness, and intent, the jury should "presume that a person intends the natural and

probable consequences of his acts." Finding the charge erroneous, this Court bluntly noted:

> This Court has previously held that where a conspiracy is charged, the Government must establish a "specific" intent to violate the substantive statute beyond a reasonable doubt. The charge here cannot be reconciled with this requirement. We have for many years warned against the use of this type of charge, and are somewhat surprised at its continued appearance.
>
> 529 F.2d at 159. (Citations omitted).

Several months after Bertolotti, and ten years after Barash, this Court is again confronted with a "natural and probable consequences" charge in a case requiring proof of specific intent. We submit that the employment of this charge, when combined with the other errors in the charge, constitutes explicit and fundamental error affecting substantial rights. Accordingly, the judgment of conviction should be reversed.

C. The Court's Charge on Knowledge

Finally, Judge Bartels erred by rendering a confusing and misleading charge on the question of knowledge, a charge which, moreover, may have had the effect of minimizing the Government's burden of proof on this issue.

The court charged that in determining knowledge the jury should consider that "[n]o person can intentionally avoid knowledge by closing his eyes to the facts that would lead a reasonable man to investigate. However, a mere suspicion that something is wrong or improper is not equivalent to knowledge or intent."

Later, the District Court continued:

> No person can disclaim knowledge by closing his eyes intentionally to facts which would have been obvious to a reasonable man. The circumstantial evidence sufficient to support a charge of knowledge and intent to possess stolen United States Treasury checks or to negotiate them, issue, utter United States Treasury checks with forged endorsements thereon must be sufficiently persuasive, however, as to exclude the inference of innocence under the circumstances.
>
> (Tr.607; emphasis added).

That instruction was erroneous. In order to sustain a conviction for uttering forged endorsements, the Government was required to show that appellant knew the endorsements were forged; to sustain a conviction for possession of checks stolen from the mails, the Government was required to show that appellant knew the checks were stolen. While there are circum-

stances where one can be charged with knowledge for "deliberately closing his eyes to facts," that concept applies only when the defendant's actions evince "a conscious purpose to avoid learning the truth." United States v. Abrams, 427 F.2d 86, 91 (2d Cir.), cert. denied, 400 U.S. 832 (1970); United States v. Sarrantos, 455 F.2d 877, 882 (2d Cir. 1972).[11] The court's unbalanced charge, which created the possibility that the jury would find knowledge irrespective of appellant's good faith, as long as he closed his eyes, permitted a finding of knowledge based on foolishness, carelessness, or negligence. That probability was increased by the court's instruction that intent could be found by appellant's closing his eyes to facts obvious to a "reasonable man." Appellant, had he investigated, could not be charged with knowledge by failing to see what a reasonable man should have seen so long as he honestly believed the endorsements were not forged and the checks not stolen. United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975). Thus, the inference of knowledge should only have been drawn where appellant closed his eyes with conscious intent to avoid discovering "facts which should have been obvious to him" (see

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[11] In United States v. Natelli, 527 F.2d 311, 323 (2d Cir. 1975), cert. denied, 48 L.Ed.2d 195 (1976), this caveat was held not required under circumstances where "the defendant is under a specific duty to discover the true facts." Here, of course, appellant did not have a duty, similar to that of the certified public account in Natelli, to discover the "true facts."

charges approved in United States v. Brawer, 482 F.2d 117, 128-129 (2d Cir. 1973); United States v. Jacobs, 475 F.2d 270, 287-288 (2d Cir.), cert. denied sub nom. LaVallee v. United States, 414 U.S. 821 (1973)).

The court's charge on this issue therefore invited the jury to draw an impermissible inference of knowledge merely from appellant's negligence or foolishness. Since there is no doubt, accepting appellant's version of the facts, that he was quite foolish and negligent in failing to investigate Black's activities, the court's charge on this issue was extremely damaging.

Worse still, the court created the very real probability that the jury would analyze the issue under a diluted standard of proof when it confused the inference of knowledge which could be drawn where a defendant deliberately and wilfully avoided learning what would have been obvious to him with the presumption of innocence, by charging that the "circumstantial evidence [of knowledge] ... must be sufficiently persuasive to exclude the 'inference of innocence' under the circumstances." The Government was required to do more than exclude an "inference," they were required to prove guilt beyond a reasonable doubt. The court's dilution of the burden of proof was fundamental and plain error. United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972).

In sum, the court erred in its instruction on the elements of

the crime charged as well as its definition of intent and knowledge. Accordingly, despite the lack of an exception, the judgment must be reversed and a new trial afforded at which appellant will be tried with a clear and proper charge on the essential elements of the offenses.

CONCLUSION

For the reasons stated in Point I, the judgment of conviction on Counts 3, 5, 7, 11, 13, 15, and 17 must be reversed, the counts dismissed, and the case remanded for resentence; for the reasons stated in Point II, the case must be reversed for a new trial.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF SERVICE

July 22, 1976

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York.

David I. Gelbfish